

10596 PROCEDURES TO FOLLOW UPON ISSUANCE OF BOARD ORDER

Compliance actions taken prior to the Board order, including any period of the notice posting, should be accorded full recognition as compliance with the Board order.

Should the charged party not agree to comply and/or exceptions are to be filed, the Region should:

- Continue to pursue compliance or settlement.
- Continue to monitor the viability of respondent by reviewing any information submitted by the charging party and/or discriminatee regarding the viability of respondent, run a database search (AutoTrak) for respondent and respondent's principals to see if the corporation is in good standing and that affiliated companies have not been formed, and begin an investigation if necessary.
- Maintain contact with discriminatees through quarterly requests for information from which backpay could be calculated.
- Update backpay calculations.

10596 Procedures To Follow Upon Issuance of Board Order

The Compliance Officer should initiate compliance action with its remedial provisions as soon as a Board order issues by:

- Providing respondent with a copy of the Board's order and requesting, in writing, that respondent begin to take steps to comply with the Board's order to implement any of the affirmative provisions, including, but not limited to, posting the Notice to Employees, offering reinstatement, and expunging files. The letter should also ask for any documents that will be needed to calculate backpay or any other monetary remedy.
- Update backpay calculations.
- If possible, negotiate settlement pursuant to remedy ordered by the Board.
- Continue to monitor the viability of respondent by reviewing any information submitted by the charging party and/or discriminatee regarding the viability of respondent, run a database search (AutoTrak) for respondent and respondent's principals to see if the corporation is in good standing and that affiliated companies have not been formed, and begin an investigation if necessary.

10598 Determination of Compliance With an Unenforced Board Order

If the Region determines respondent has fully complied with the Board's Order, a preclosing letter should be sent to the charging party soliciting its position on compliance. If the charging party has no objections, the case should be closed. If the charging party has objections, the objections should be investigated and a Regional determination made. If the Region determines the objections are without merit, the charging party has a right to a compliance determination.

10600 Compliance Determination

Final authority concerning compliance with the remedial provisions of a Board's orders rests with the Board.¹⁴² Regional Directors exercise authority in compliance proceedings as agents of the Board.

Sections 102.52 and 102.53 of the Board's Rules and Regulations provide that a charging party may appeal a Regional Director's determination that a respondent has complied with the remedial provisions of a Board order by filing an appeal with the General Counsel. If the General Counsel denies the appeal, the charging party may file a request for review of that action with the Board.

The appeal procedure is only available to a charging party, and not to discriminatees who are not also a charging party, unless the discriminatee has intervened in the case pursuant to Section 102.29 of the Board's Rules and Regulations. Although nonparty discriminatees lack appeal rights, their interests and wishes should be considered by the Region in determining compliance requirements.

In cases where a respondent contests the compliance requirements determined by the Region and will not comply with them, recourse to the Board in some cases may be available through formal compliance proceedings that lead to a supplemental Board order. Section 10646. In a formal compliance hearing, a charging party has the opportunity to seek remedial relief not included in or at odds with the Regional Director's requested remedies as set forth in the compliance specification.¹⁴³

10602 Issuance of a Compliance Determination

When a charging party disputes the Region's determination of what constitutes compliance, the Compliance Officer should advise the charging party that it has the right to request a written determination by the Regional Director of compliance requirements.

In response to such a request, the Region should issue a letter that includes a concise, self-contained compliance determination, setting forth all facts established during the compliance investigation on which the determination has been based as well as the legal basis for the determination. It may be limited to the compliance requirements that are being disputed by the charging party. The compliance determination shall also contain notification of the charging party's appeal right to the General Counsel within 14 days, and a copy of Form NLRB-5434 Notice of Compliance Appeal.

As with dismissal letters, a copy of the Regional Director's compliance determination should be sent to the Office of Appeals. In the event an appeal is filed, the Region should prepare a comment on the appeal, either specifically responding to the charging party's allegations or noting where in the file the response can be found.

10602.1 Procedures to Follow Upon the Filing of an Appeal of a Compliance Determination

A charging party's appeal to the General Counsel of the Region's compliance determination will be considered by the Office of Appeals. On receipt of a copy of the

¹⁴² *Ace Beverage Corp.*, 250 NLRB 646 (1980).

¹⁴³ See *Kaunagraph Corp.*, 313 NLRB 624 (1994).

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appeal, or a copy of a letter from the Office of Appeals acknowledging the appeal, the Region should promptly submit the Region's compliance file or its relevant portions. The Region should prepare a comment on the appeal, either specifically responding to the charging party's allegations or noting where in the file the response can be found.

10602.2 Procedures Following the Filing of a Request for Review With the Board

Should the General Counsel deny the appeal of a compliance determination, the charging party may file a request for review with the Board within 14 days.

As noted in Section 10602, if the charging party files a request for review, the record before the Board will normally only consist of the request for review, the Region's letter setting forth its compliance determination, and the Office of Appeal's letter denying the appeal, as well as the Region response (Section 10602.4), if appropriate. Accordingly, the Region's compliance determination should set forth clearly all the facts on which it is based, to ensure that the Board has before it sufficient information to make a decision.

The Region should carefully evaluate the request for review to ensure that the Board has before it sufficient information to rule on the request for review.

10602.3 No New Issues Raised in Request for Review

If the Region concludes that the charging party failed to raise issues not previously considered and discussed in the Regional Director's compliance determination and the General Counsel's denial of the appeal, it should so advise the Board as promptly as possible.

10602.4 New Issues Raised in Request for Review

If the Region concludes that the request for review raises issues not fully discussed in the documents before the Board, it should advise the Board that it will file a response and the approximate date that the response will be filed. The Region's response may be in the form of a memorandum to which public documents may be attached to supplement the existing record. In either case, any response, including attachments, must be served on the charging party, and the Board provided with an affidavit of service.

10604 Determination of Noncompliance With an Unenforced Board Order

The Compliance Officer is responsible for investigating any complaint of non-compliance. The complaining party should be asked to submit whatever evidence is available to support the complaint.

10604.1 Criteria for Filing a New Unfair Labor Practice Charge

Whether a new charge should be filed depends on the circumstances of the case. Unless the matter complained of is clearly encompassed by the compliance requirements of the Board Order, the better practice is to advise the party making the allegation to file a new unfair labor practice charge. The reason is that if the newly alleged unlawful conduct is beyond the scope of the remedial provisions of an outstanding settlement agreement or Board order, unfair labor practice charges to address such new conduct must be filed within the 10(b) period.

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10604.2 Procedures When a New Unfair Labor Practice Charge is Filed

If the Region finds merit to a new unfair labor practice charge that may constitute noncompliance with an unenforced Board order, the Region should attempt to resolve the matter and, failing that, determine whether a new complaint is warranted (for example, would a new unfair labor practice proceeding lead to remedies beyond those provided by the existing Board order). In case of doubt, Regions may consult with the Division of Operations-Management as to the propriety of issuing a new complaint. In addition, the Region should consult with Operations concerning whether enforcement proceedings should be initiated with respect to the existing Board order.

10604.3 Procedures When a New Unfair Labor Practice Charge is Not Filed

When an allegation of noncompliance is made without the filing of a new charge, it should be investigated as a compliance matter. The Compliance Officer should advise the parties of the results of the compliance investigation regarding the allegation(s) as well as other compliance requirements. The Compliance Officer should attempt to resolve the allegation(s), along with any other disputed compliance issue, through voluntary settlement.

If settlement efforts fail and if it is determined that the respondent has complied, the case should be closed at the appropriate time. If the charging party objects, see Section 10600 with respect to its right to a compliance determination. If it is determined that the respondent is not complying, enforcement proceedings as set forth in Section 10606 are warranted.

10604.4 Noncompliance With an Unenforced Board Order Originating in Another Region

When the investigation of a charged party's prior history reveals that meritorious allegations also violate remedial provisions of an unenforced Board order that originated in another Regional Office, the Regional Director investigating the new charge should contact the Regional Director from the Region in which the Board order originated and obtain his/her opinion concerning the appropriateness of enforcement proceedings in light of the new charge. The Regional Director investigating the new charge should consult with the Division of Operations-Management concerning the other Regional Director's views and discuss the appropriateness of enforcement proceedings. Authorization from Operations is required before the Region may issue complaint or settle those allegations of the charge that may constitute noncompliance with the Board order.

10604.5 When a Respondent Fails or Refuses to Comply With Provisions of a Board Order, Further Proceedings to Compel Compliance Require Enforcement of the Board Order by a United States Court of Appeals

Such proceedings also provide a means by which a respondent may appeal a Board order. Section 10632, Contempt and Other Post Judgment Proceedings and Section 10646, Formal Compliance Proceedings, set forth procedures for compelling compliance after a circuit court of appeals has entered judgment enforcing a Board order.

10606 Criteria for Recommending Enforcement Proceedings

When a Board order issues, the Compliance Officer should take prompt action to secure compliance. Normally, an enforcement recommendation should be made only after efforts have been made to procure compliance. The Compliance Officer should consider the following factors before deciding to submit an enforcement recommendation.

10606.1 Liquidating Backpay Before Recommending Enforcement

In general, there is no requirement that an unfair labor practice case be enforced before compliance proceedings are initiated.¹⁴⁴ Although enforcement of the underlying Board order is normally sought prior to issuance of a compliance specification, there may be situations where the Region concludes that a compliance proceeding in a Board order case should move forward immediately, although enforcement of the Board order has not been obtained. For example, if respondent is not financially viable and the Region decides to pursue alter egos, successors, personal liability or similar issues, the Region should litigate these issues prior to recommending the case for enforcement. See Section 10508.3. The Region should contact the Division of Operations-Management if there is any question as to whether the Region should proceed to a backpay hearing or recommend the case for enforcement. If a decision to submit the case for enforcement is made, the Region should then consult the Appellate Court Branch before submitting the case.

10606.2 Forgoing Enforcement When Only Compliance Requirements Are Disputed

Although enforcement of the underlying Board order is normally sought prior to issuance of a compliance specification, there may be situations in which respondent may be willing to voluntarily forgo enforcement proceedings where only compliance requirements are disputed. The respondent may dispute compliance requirements of a Board order without contesting the underlying findings that it has violated the Act. Section 10646. Thus, when disputed compliance issues cannot be resolved in such cases, the respondent should be asked to enter into a stipulation that waives enforcement proceedings, while reserving its right to litigate disputed compliance issues in a compliance hearing. See Appendix 13 for a sample stipulation. However, it is not necessary to obtain such a stipulation, if circumstances otherwise warrant issuance of a compliance specification prior to obtaining enforcement of the underlying Board order. Sections 10508.3 and 10606.1.

10606.3 Recommending Enforcement

If it appears likely that a respondent will not comply with the Board's order, enforcement should be recommended. A respondent may demonstrate unwillingness to comply by its response to inquiries, requesting repeated conferences or otherwise delaying. The Region may recommend enforcement of a Board order notwithstanding a respondent's offer of compliance or even the achievement of compliance. For example,

¹⁴⁴ See Board Rule 102.54(b). See also, *Yonkers Associates*, 94 L.P., 340 NLRB 1237 (2003), enfd. 416 F.3d 119 (2d Cir. 2005). In *Yonkers*, the Board stated as follows: "[w]e . . . will not defer the process of this compliance proceeding pending the outcome of a court review of the underlying decision and order."

the Region may conclude that it is appropriate to enforce a Board order against a union arising from unlawful picketing when the union has a history of similar unlawful conduct and the Region concludes that a judgment is appropriate as a basis for contempt proceedings in the event of future unlawful conduct.

10606.4 Respondent's Filing of Request for Review

The respondent may itself initiate proceedings before a United States Court of Appeals by filing a request for review of the Board order, in effect appealing the Board's Decision and Order. In such cases, it is not necessary to submit a recommendation for enforcement because the Division of Enforcement Litigation routinely files a cross-application for enforcement.

10606.5 Charging Party's Filing Petition for Review

When the charging party files a petition for review, the Region should make a recommendation to the Division of Enforcement Litigation as to whether the Division should file an application for enforcement. If the Region concludes that the respondent has complied with the Board order, e.g., the recommendation would be not to file.

10608 Procedures for Recommending Enforcement

The Regional Director is responsible for recommending proceedings to enforce a Board order and for advising the parties that such a recommendation has been made.

10608.1 Submission

The submission should be submitted electronically to the Division of Enforcement Litigation and should include:

- Regional Director's recommendation that enforcement proceedings be initiated.
- Compliance Officer's report which should include:
 - status of respondent's compliance with Board order including copies of pertinent correspondence,
 - status of settlement negotiations,
 - backpay computations, including a brief summary of strengths and weaknesses of General Counsel's case regarding backpay,
 - Database searches (AutoTrak) or secretary of state status report on current viability of respondent and possible disguised continuances, if any.
- Notification to the parties of the enforcement recommendation.
- Current service sheet setting forth names, addresses, and telephone numbers for all parties and counsel.
- Duplicate exhibits and transcripts from the underlying proceedings should also be submitted, separately, under cover of a transmittal slip addressed to: Appellate Court Branch, attention _____, Chief, Litigation Services. The transmittal slip should contain the notation, "Enforcement

10610 ACTION FOLLOWING AN ENFORCEMENT RECOMMENDATION

recommended.” In addition, upon notification of the filing in the Court of Appeals by respondent of a petition for review of a Board order, the Region should also forward its copy of the transcript of the underlying complaint proceeding to the Appellate Court Branch. In cases involving an 8(a)(5) test of Board certification, the Region should also submit the R-case transcript, original exhibits, and the Region’s case file, without any witness affidavits, to the Appellate Court Branch.

10608.2 Timing of Submission

Even where investigation and discussion of compliance issues is required, prompt action should be sought so that the Region will normally be able to submit an enforcement recommendation within operational goals following the receipt of the Board order. Section 10692. If there is a dispute over what constitutes compliance, or if the Region regards enforcement as necessary notwithstanding actual compliance, the Region’s memo recommending enforcement should cover these issues.

10608.3 Test of Certification Cases

Since these cases are not backpay related and deal with important rights of employees, the Region should make every effort to submit its enforcement recommendation as soon as possible, preferably within seven (7) days following its receipt of the Board’s order.

10608.4 Need for Immediate Relief

If circumstances indicate that immediate injunctive relief under Section 10(e) of the Act should be considered, the Region should submit an appropriate recommendation and explanation to the Division of Enforcement Litigation with a copy to the Division of Operations-Management.

10608.5 Filing of Petition

The Appellate Court Branch will be responsible for filing the petition for enforcement with an appropriate United States Court of Appeals and for all further proceedings leading to entry of judgment by the court. Should a respondent file a motion for reconsideration of its order with the Board after enforcement has been recommended, the Region should notify the Appellate Court Branch promptly.

10610 Action Following an Enforcement Recommendation

Neither an enforcement recommendation nor the initiation of enforcement proceedings before a United States Court of Appeals preclude the possibility of compliance with a Board order. To the contrary, compliance may be accomplished at any time during such proceedings, and could be the basis for withdrawal of such proceedings. Even after enforcement has been recommended, the Compliance Officer should:

- Continue to pursue compliance or settlement and consult in a timely manner with the Appellate Court Branch about any change or progress in achieving compliance and/or significant developments in the case. If the case is in court mediation, the Region should refrain from settlement discussions with the parties. It is important at this stage that all settlement discussions with the

10612 RESPONDENT'S COMPLIANCE WITH BOARD ORDER AFTER SUBMISSION OF ENFORCEMENT RECOMMENDATION

Respondent be coordinated by the Appellate Court Branch and that the Compliance Officer assists and works closely with the Appellate Court Branch to facilitate a favorable result.

- Continue to monitor the viability of respondent by reviewing any information submitted by the charging party, discriminatee, and/or periodically conduct database searches (AutoTrak), regarding the viability of respondent and begin an investigation if necessary.
- Maintain contact with discriminatees through quarterly requests for information from which backpay could be calculated.
- Update backpay calculations.

10612 Respondent's Compliance with Board Order After Submission of Enforcement Recommendation

If full compliance is obtained or if the Regional Director wants to recommend a suspension or withdrawal of enforcement action, the recommendation should be submitted electronically to the Appellate Court Branch.

10614 Procedures to Follow Upon Issuance of Court Judgment

Actions to obtain compliance with judgments enforcing Board orders should not await the entry of Mandate. If the court only partially enforces the Board order, compliance should ordinarily be sought immediately with respect to the portions enforced. If respondent seeks certiorari, compliance efforts should not be deterred, unless a stay has been granted. If no stay is granted and respondent refuses to comply, the case should be submitted to the Contempt Litigation Compliance Branch, with a copy to the Division of Operations-Management, to initiate contempt proceedings. See also Section 10692.3. The Compliance Officer should initiate compliance action with its remedial provisions as soon as a court judgment issues by:

- Providing respondent with a copy of the judgment and requesting, in a letter, that respondent immediately initiate steps to comply with the judgment, including, but not limited to, posting the Notice to Employees, offering reinstatement, and expunging files. The letter should also ask for any documents that will be needed to calculate backpay or any other monetary remedy.
- Updating backpay calculations.
- Negotiating compliance pursuant to the remedy ordered by the Court.

10616 Noncompliance With a Court Judgment

If respondent fails or refuses to take action required by a court judgment or engages in conduct that violates the negative provisions of a court judgment, prompt action should be undertaken to ensure compliance:

- In cases where respondent refuses to comply with the clear requirements of the judgment (other than the payment of backpay, where the amount owed